

2007

Elaine Jenkins v. Alan Jenkins, Trustee, D.U.
Company, Inc, Davis County Cooperative Society,
Inc. : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS

ELAINE JENKINS,

Appellee/Plaintiff,

vs.

Case No. 20070061-CA

ALAN JENKINS, TRUSTEE, D.U.
COMPANY, INC., DAVIS COUNTY
COOPERATIVE SOCIETY, INC.,

Appellant/Defendants.

ALAN JENKINS, TRUSTEE,

Appellant/Plaintiff

vs.

ELAINE JENKINS, LOREN JENKINS,
STANLEY JENKINS and JEREMIAH
JENKINS,

Appellees/Defendants.

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TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bearden vs. Wardley Corporation</u> , 72 P.3d 144, fnt 4 (Utah 2003).....	24
<u>Black vs. McKnight</u> , 562 P.2d 621, 621 (Utah 1977).....	27
<u>Booth v. Attorney’s Title Guaranty Fund, Inc.</u> , 20 P.3d 319 (Utah 2000).....	15
<u>Conder v. Hunt</u> , 1 P.3d 558 (UT 2000).....	34
<u>Cox v. State</u> , 751 P.2d 1152, 1154 (Utah App. 1988).....	23
<u>Elaine Jenkins vs. Samuel Walton Jenkins</u> , Civil No. 964905253 (Utah 3 rd Dist. Ct.).....	7
<u>Macris & Associates, Inc. v. Neways, Inc.</u> , 16 P.3d 1214, 1222 (Utah 2000).....	17, 31
<u>Normandeau vs. Hanson Equipment, Inc.</u> , 174 P.3d 1 (Utah App. 2007).....	13, 24, 28
<u>Orton vs. Carter</u> , 970 P.2d 1254 (Utah 1998).....	14, 16, 27
<u>Park vs. Zions First National Bank</u> , 673 P.2d 590 (Utah 1983).....	36
<u>Peterson v. Coca-Cola USA</u> , 48 P.3d 941, 944 (Utah 2002).....	15
<u>Ravarino v. Price</u> , 260 P.2d 570 (Utah 1953).....	17
<u>Robinson vs. All-Star Delivery, Inc.</u> , 992 P.2d 969 (Utah 1999).....	29, 33
<u>Smith v. Smith</u> , 1999 UT App 370, ¶ 8, 995 P.2d 14.....	24
<u>State v. Herrera</u> , 895 P.2d 359, 368 (Utah 1995).....	25
<u>State v. James</u> , 174 P.3d 1, 10-11 (Utah App. 2007).....	24
<u>State v. Stringham</u> , 17 P.3d 1153, 1157 (Utah App. 2001).....	23
<u>State v. Tinoco</u> , 860 P.2d 988, 990 (Utah App. 1993).....	23, 29
<u>Summerill v. Shipley</u> , 890 P.2d 1042, 1045 (Utah App. 1995).....	23
<u>Tanner v. Provo Reservoir Co.</u> , 2 P.2d 107 (Utah 1931).....	34

TABLE OF AUTHORITIES (cont.)

<u>CASES (cont.)</u>	PAGE
<u>Tingey v. Christensen</u> , 987 P.2d 588, 592 (Utah 1999).....	23
 <u>MISCELLANEOUS</u>	
Utah Code Ann. § 25-5-1.....	14
Utah Code Ann. § 78-2a-3(2)(j).....	1
Utah Code Ann. § 78-12-7.....	35
Utah Code Ann. § 78-12-12.....	35
Utah Code Ann. § 78-12-25(3).....	20, 34
Utah Rules of Appellate Procedure, Rule 11(c)(2).....	21
Utah Rules of Appellate Procedure, Rule 24(j).....	25
Utah Rules of Appellate Procedure, Rule 24.....	24, 25
Utah Rules of Appellate Procedure, Rule 24(a)(9).....	24
Utah Rules of Civil Procedure, Rule 12.....	34
18 Charles A. Wright Arthur R. Miller & Edward H. Cooper, <u>Federal Practice and Procedures</u> § 4443, at 382 (1981).....	19

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION.....	1
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	1
SUMMARY OF ARGUMENT.....	11
ARGUMENT.....	13
II <u>THE TRIAL COURT DID NOT ERR IN DENYING</u> <u>ALAN JENKINS' MOTION FOR SUMMARY JUDGMENT</u>	13
A. <u>Plaintiff's Claims Were Not Barred by the Statute of Frauds.</u>	14
B. <u>Plaintiff's Claims Are Not Barred by the Doctrine of Issue</u> <u>Preclusion.....</u>	17
(i) <u>No "identity of issues."</u>	18
(ii) <u>Not competently, fully and fairly litigated.....</u>	19
II <u>THE TRIAL COURT DID NOT ERR IN DENYING ALAN</u> <u>JENKINS' MOTION TO AMEND HIS ANSWER TO</u> <u>INCLUDE THE STATUTE OF LIMITATIONS DEFENSE.</u>	20
III. <u>THE TRIAL COURT DID NOT ERROR IN DENYING ALAN</u> <u>JENKINS JURY INSTRUCTIONS.....</u>	23
A. <u>Standard of Review.....</u>	23
B. <u>Failure to Adequately Brief.....</u>	24
C. <u>Refusal to Give the Requested Instructions was not</u> <u>Reversible Error.....</u>	25
1. <u>Four Statute of Frauds instructions.....</u>	25
(i) <u>Inapplicable.....</u>	26
(ii) <u>Misstates the law.....</u>	27
(iii) <u>Unnecessary.....</u>	27
(iv) <u>Covered in other instructions.....</u>	28
(v) <u>No prejudice.....</u>	29

TABLE OF CONTENTS (cont.)

2. <u>Two Estoppel Jury Instruction</u>	30
(i) <u>Inapplicable</u>	31
(ii) <u>Misstates the law</u>	31
(iii) <u>No prejudice</u>	32
3. <u>Statute of Limitations Instructions</u>	33
(i) <u>Inapplicable</u>	34
(ii) <u>Misstates the law</u>	34
(iii) <u>No prejudice</u>	35
4. <u>Adverse possession instruction</u>	35
(i) <u>Inapplicable</u>	35
(ii) <u>Misstates the law</u>	36
(iii) <u>No prejudice</u>	37
CONCLUSION.....	37
CERTIFICATE OF SERVICE.....	38
ADDENDUM A	

JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Annotated §78-2a-3(2)(j).

STATEMENT OF ISSUES

Appellee does not object to Appellant's statement of issues. Appellee does object to Appellant's statement of the applicable standards of review for issue one (denial of Appellant's Motion for Summary Judgment) and issue three (failure to give certain requested Jury instructions.) The proper standard of review for those issues is included in the discussion of each of those issues below.

STATEMENT OF CASE

This case involved a quiet title action by Elaine Jenkins against Alan Jenkins, D.U. Company and the Davis County Cooperative Society. D.U. Company was dismissed from the action on its own motion, since D.U. Company claimed no interest in the property. At trial, the Davis County Cooperative Society disclaimed any interest in the property. As between Elaine Jenkins and Alan Jenkins, the owner of record of the property, a Jury found in favor of Elaine Jenkins. Based on the Jury's verdict the property was quieted in the name of Elaine Jenkins and Sam Jenkins (Elaine Jenkins' deceased husband), as against any interest by Alan Jenkins, D.U. Company or the Davis County Cooperative Society.

STATEMENT OF FACTS

1. Elaine Jenkins was raised in an economic system under which all "income" and "property" of the members were held "in common" (the "Order.") R.384, p.45.

2. As a teenager and during her early 20s, Elaine Jenkins worked for at least eight businesses owned by or affiliated with the Order. R.384,¹ p. 37-43.

3. Elaine Jenkins did not receive a paycheck for work performed at any of those businesses, but instead received each month a number of “units” credited to her “account” with the Davis County Cooperative Society, an entity that was part of the Order.² R. 384, p. 39.

4. “Units” were equivalent to “cash.” R. 384, p. 52

5. Having “units” on deposit in your account was like having cash in a “savings account,” that was available to “spend on something.” R. 384, p. 2.

6. One way Elaine Jenkins (and other members of the Order) could spend those “units” by going to “another business that was owned by the [Order], buy[ing] whatever goods they had there, or services, and it was debited off of [her] statement.” R. 384, p. 39.

7. Each month Elaine Jenkins would receive a “statement” from the Davis County Cooperative Society that showed the number “units” that she had earned for that

¹Elaine Jenkins worked for Velanz Manufacturing Company (as a seamstress), Imperial Market (as a clerk and cashier), Shoppers Discount (as a clerk), Co-op Department Store (as manager of the shoe department), a potato farm in Idaho (moving pipes and weeding), orchards (picking fruit), East Gate Publishing Company and East Side Market. R. 384, p. 37-43.

²The number of units “credited” to Elaine Jenkins’ account each month was based on the number of hours worked. R. 384, p. 39. When a member of the Order worked for a business that was not affiliated with the Order, the money earned from that business was turned over to the Davis County Cooperative Society and credited to the member’s account. R. 384, p. 44. For example, when Elaine Jenkins worked for The Burnham Gun Club, a business not affiliated with the Order, all of the money that she earned was given to the Davis County Cooperative Society, and then “credited to [Elaine Jenkins] on [her] statement.” R. 384, p. 44.

month and the number of “units” spent.³ R. 384, p. 39.

8. Sam Jenkins was also a member of the Order. R. 382, p. 42.

9. In 1975, Sam and Elaine Jenkins were married. R. 384, p. 50.

10. After their marriage, Sam and Elaine Jenkins continued to receive monthly statements from the Davis County Cooperative Society that showed the number of “units” credited to and the number of “units” debited from their account each month. R. 384, p. 49.

11. At trial, Elaine Jenkins introduced copies of thirty-three (33) monthly statements that she and Sam Jenkins had received from the Davis County Cooperative Society, between September 1979 and July 1996. R. 384, p. 49. See Plaintiff’s Exhibit 1.

12. After their marriage, Sam and Elaine Jenkins decided to purchase a home in Woods Cross, Utah (the “Woods Cross House”). R. 384, p. 52.

13. The purchase price was \$40,000. R. 384, p. 52.

14. When Sam and Elaine Jenkins bought the Woods Cross House, they paid for

³Each statement included a list of “service slip deposits” and “service slip expenses” for the month. A “service slip deposit” reflected a specific transaction pursuant to which a certain number of units were credited to the account, such as “units” for work performed at a business affiliated with the Order. A “service slip expense” reflected a specific transaction pursuant to which a number of units were debited from the account. Each statement also listed the number of “units used” and “units owned.” “Units used” reflected the number of “units” converted to physical assets that belonged to the member, such as furniture, a vehicle or a house. “Units owned” was the number of “units used” plus the number of “units” on deposit in the account. If the number of “units owned” was greater than the number of “units used,” then the member had a positive balance, and the account accrued interest. If the number of “units owned” was less than the number of “units used” then the member had a negative balance and the member paid interest. R. 384, p. 47-52.

it with 40,000 “units” from their account.⁴ R. 384, p. 45.

15. The closest statement Elaine Jenkins had prior to the purchase of the Woods Cross House was for September, 1979, which showed that the Jenkins had a credit of 24,776.10 units. R. 384, p. 51-52.

16. The closest statement Elaine Jenkins had after the purchase of the Woods Cross House was for November 1981, which showed the Jenkins had a debt of 7,969.16 units. R. 384, p. 53.

17. The difference between those two statements was accounted for by, among other things, the 40,000 units debited from the Jenkins’ account to purchase the Woods Cross House. R. 384, p. 53.

18. When members of the Order purchased a home, they were “expected to turn the title [to home] over to [the Order] and allow [the Order] to put title in the name of one of their entities.” R. 384, p. 37.

19. The Woods Cross House was titled in the name of “Worldwide,” one of the companies owned and operated by the Order. R. 384, p. 53-54.

20. Each year, the Davis County Cooperative Society gave each member of the Order an “inventory” that listed all property owned by the member. R. 384, p. 55.

21. The annual inventories for Sam and Elaine Jenkins for 1984 and 1985 each

⁴The Woods Cross House was not owned by someone outside the Order. Therefore, the payment of the purchase price for the Woods Cross Home consisted of the transfer of the 40,000 “units” from one account within the Davis County Cooperative Society (i.e., the Jenkins’ account) to another account within the Davis County Cooperative Society.

listed a “House” valued at \$40,000 as “Sam and Elaine Jenkins’ Property.” R. 384, p. 56-57. See Plaintiff’s Exhibit 2, and Addendum A hereto.

22. After they purchased the Woods Cross House, the property taxes for the Woods Cross House were debited from the Jenkins’ account each year for payment of the property taxes on the Woods Cross House. R. 384, p. 65. See, e.g., Plaintiff’s Exhibit 3 (\$844.31 charged to the Jenkins’ account in 1987 for “prop taxes 85 thru May 87.”)

23. Sam and Elaine Jenkins subsequently “decided that [they] needed a bigger house.” R. 384, p. 57.

24. The Jenkins asked Ortel Kingston, the leader of the Davis County Cooperative Society, if they could “trade the equity from the Woods Cross House [toward] another house; and he said [they] could.” R. 384, p. 57.

25. The Jenkins located a house at 1074 North Redwood Road (the “Redwood Road House”), and negotiated the purchase of that house for \$50,000. R. 384, p. 57-59.

26. The purchase price was paid by Sam and Elaine Jenkins, with \$40,000 coming from their equity in the Woods Cross House and 10,000 “units” deducted from the Jenkins’ account with the Davis County Cooperative Society. R. 384, p. 61.

27. When the Redwood Road House was purchased, it was titled in the name of “D.U. Company,” a holding company owned and operated by the Order. R. 384, p. 60. See Warranty Deed from D. Gordon Berg to D.U. Company, Inc., dated November 31, 1986, Defendant’s Exhibit 12.

28. Although the Redwood Road House was title in D.U. Company, Sam and Elaine Jenkins considered themselves to be the owners of the Redwood Road House and “were recognized as the actual owners” of the Redwood Road House by the members of the Order. R. 384, p. 54.

29. Because Sam and Elaine Jenkins “paid for the house,” it “actually belonged to them.” R. 384, p. 55.

30. The annual inventories that Elaine Jenkins introduced at trial for 1987, 1990, 1994 and 1995, each listed the “House Redwood Road” valued at \$50,000 as Sam and Elaine Jenkins’ “Property.” See Plaintiff’s Exhibit 2, attached hereto as Addendum A.⁵ R. 384, p. 66-67.

31. The property taxes for the Redwood Road House were debited each year from the Jenkins’ account with the Davis County Cooperative Society. See, e.g., Plaintiff’s Exhibit 6, which includes charge slip 7870, dated December 1, 1990, charging the Jenkins \$1,019.17 for “property taxes,” and charge slip 9100, dated December 31, 1997, charging the Jenkins \$701.01 for “property taxes 1074 N Redwood.” R. 384, p. 86.

32. For a period of time the Jenkins moved to Idaho. R. 384, p. 67-68.

33. During that period of time, the Jenkins rented the Redwood Road House to

⁵The 1987 annual inventory listed both the Wood Cross House and the Redwood Road House as property belonging to the Jenkins. After purchasing the Redwood Road House, the Jenkins moved from the Woods Cross House to the Redwood Road House. However, the Jenkins “carried” both homes for a period of time before the Davis County Cooperative Society transferred the Woods Cross House off the Jenkins’ inventory list. R. 384, p. 63-64.

Karen Bjorkman. R. 384, p. 68.

34. Although Karen Bjorkman's rent was paid each month by "Salt Lake County Housing Authority" to D.U. Company, the full amount of the rent was credited back to the Jenkins on their monthly statements with the Davis County Cooperative Society since D.U. Company held title to the Redwood Road House for the benefit of the Jenkins.⁶ R. 384, p. 69-70.

35. In 1996, Elaine Jenkins announced that she was leaving the Order.

36. In 1996, Elaine Jenkins also commenced a divorce action against Sam Jenkins, captioned Elaine Jenkins vs. Samuel Walton Jenkins, Civil No. 964905253 (Utah 3rd Dist. Ct.).

37. On May 27, 1997, Elaine Jenkins signed a stipulation in that divorce proceeding that stated:

10. During the course of the marriage the parties acquired certain real property in Rupert, Idaho...

11. The parties acquired no other real property during the course of the marriage.

See Defendant's Exhibit 9.

38. Prior to signing the stipulation, Elaine Jenkins asked her lawyer if signing the stipulation would affect her right to claim ownership of the Redwood Road House in the future, should the need arise. R. 384, p. 71.

⁶The Salt Lake County Housing Authority would only pay rent to the record title holder of the Redwood Road House.

39. Based on that discussion, Elaine Jenkins understood that after signing the stipulation she would “still ha[ve] a right to pursue [a] claim” to the Redwood Road House in the future, if necessary. R. 384, p. 71-72.

40. If Elaine Jenkins had understood otherwise, she would not have signed the stipulation. R. 384, p. 72.

41. On August 6, 1997, based on that signed stipulation, a Decree of Divorce was entered in the divorce action that provided:

11. During the course of the marriage the parties acquired certain real property in Rupert, Idaho...

12. The parties acquired no other real property during the course of the marriage.

See Defendant's Exhibit 44.

42. On August 24, 1997, Sam Jenkins died.

43. After Sam's death, Elaine went to Paul Kingston, then the president of the Davis County Cooperative Society, and demanded that title to the Redwood Road House be deeded to her. R. 384, p. 72-73.

44. During that conversation, Paul Kingston acknowledged that Elaine Jenkins owned the Redwood Road House, but refused to deed the Redwood Road House to Elaine Jenkins.⁷ R. 384, p. 72-73.

45. Between May 15, 1997 and June 20, 1997, D.U. Company sent Elaine Jenkins

⁷Instead of deeding the Redwood Road House to Elaine Jenkins, Paul Kingston wanted to buy the Redwood Road House back from Elaine for less than fair market value. This was unacceptable to Elaine Jenkins. R. 384, p. 73.

three letters, requesting that Elaine Jenkins sign a rental agreement, and threatening to evict her if she didn't do so. See Defendant's Exhibits 37, 39, and 40. R. 384, p. 79-80.

46. Elaine Jenkins refused to do so, since she was the owner of the Redwood Road House. R. 384, pp. 73, 78-79.

47. Elaine Jenkins did not thereafter pay rent on the Redwood Road House (nor has she or Sam Jenkins ever paid rent on the Redwood Road House.) R. 384, p. 73.

48. Elaine Jenkins continued to live in the Redwood Road House and treat the Redwood Road House as her own. R. 384, p. 73-75.

49. The Jenkins maintained and repaired the Redwood Road House at their own expense - "Any time any thing broke we fixed it. Any repairs that were made were made by us." R. 384, p. 73-74.

50. The Jenkins painted, re-carpeted, fixed the furnace, installed new linoleum, replaced the vanities, installed a sprinkler system and made other improvements to the Redwood Road House. R. 384, p. 74-75.

51. Until 2005, D.U. Company did not interfere with Elaine Jenkins's occupancy of the Redwood Road House.⁸ R. 384, p. 73-79.

52. On February 8, 2005, D.U. Company "sold" the Redwood Road House to Alan Jenkins, Sam Jenkins' brother, who was a member of the Order. R. 384, p. 79.

⁸At the time Sam Jenkins died in 1997, the Jenkins had (or should have had) at least 6,000 "units" on deposit with the Davis County Cooperative Society, to be used to pay property taxes on the Redwood Road House. R. 384, p. 82.

53. That sale was without the consent or knowledge of Elaine Jenkins. R. 384, p. 79.

54. On February 18, 2005, Elaine Jenkins filed a quiet title action against Alan Jenkins.

55. Elaine Jenkins testified at trial, as well as four of her children (Stanley Jenkins, Samuel Jenkins, Rebecca Jenkins and Jesse Jenkins) and five former members of the Order (Merlin Kingston, Lynette Taylor, Rowenna Erickson, Connie Rugg and Dewey Peterson.) R. 384-386.

56. The Jury found that, in 1986, D.U. Company had acquired title to the Redwood Road House for the benefit of Sam and Elaine Jenkins:

Q. Do you find from a preponderance of the evidence that at the time the property at 1074 Redwood Road was purchased on November 21, 1986 that Sam and Elaine Jenkins and D.U. Company intended that D.U. Company hold legal title to that property for the benefit of Sam and Elaine Jenkins?

Yes X

No

See Special Verdict. R. 316-317.

57. The Jury also found that at the time Alan Jenkins “purchased” the Redwood Road House from D.U. Company in 2005 he had notice that D.U. Company held title to the Redwood Road House for the benefit of Sam and Elaine Jenkins:

Q. Do you find from a preponderance of the evidence that at the time Alan Jenkins purchased the property at 1074 Redwood

Road from D.U. Company in February, 2005, that Alan Jenkins had either actual or constructive notice that D.U. Company held legal title to that property for the benefit of Sam and Elaine Jenkins?

Yes X
No

See Special Verdict. R. 316-317.

58. On December 27, 2006, based on the Jury's findings, the trial court entered a Judgment quieting title to the Redwood Road House in the name of Sam Jenkins and Elaine Jenkins "free and clear of any liens or claims affecting title to the [Redwood Road House]" by Alan Jenkins, D.U. Company or the Davis County Cooperative Society. R. 368-370.

SUMMARY OF ARGUMENT

The Jury found that, at the time the Redwood Road House was purchased in 1986, "Sam and Elaine Jenkins and D.U. Company intended that D.U. Company hold legal title to [the Redwood Road House] for the benefit of Sam and Elaine Jenkins." The Jenkins paid the \$50,000 purchase price for the Redwood Road House with 10,000 "units" on deposit in the Jenkins' account with the Davis County Cooperative Society and with \$40,000 in equity from the Woods Cross House. The annual inventories maintained by Davis County Cooperative Society listed the Redwood Road House as property owned by Sam and Elaine Jenkins. Elaine Jenkins testified that she and Sam were the actual owners of the Redwood Road House.

In 2005, after D.U. Company “sold” the Redwood Road House to Alan Jenkins, Elaine Jenkins filed a quiet title action. The Jury found that Alan Jenkins, who was also a member of the Order, had notice of the Jenkins’ ownership of the Redwood Road House. Based on the Jury’s findings, the Court quieted title to the Redwood Road House in Sam and Elaine Jenkins name, as against any interest by Alan Jenkins, D.U. Company or the Davis County Cooperative Society.

Alan Jenkins’ Motion for Summary Judgment was properly denied. That issue is not appealable since the matter went to trial. The statute of frauds is inapplicable since the agreement to transfer the Redwood Road House to D.U. Company for the benefit of the Jenkins was fully performed in 1986. The fact that the Jenkins’ interest in the Redwood Road House was not listed in the Divorce Decree did not bar Elaine Jenkins’ claim under the doctrine of “issue preclusion.” The issue as to ownership of the Redwood Road House in the divorce proceeding was not identical to the issue as to ownership of the Redwood Road House in this case. The issue as to ownership of the Redwood Road House in this case was also not “competently, fully and fairly litigated” in the divorce proceeding.

Alan Jenkins’ Motion to File Amended Answer was also properly denied. Alan Jenkins failed to transcribe the trial court’s ruling on that motion, and for that reason alone the Alan Jenkins’ appeal on that issue should be denied.

Finally, the trial court properly refused to give the eight Jury instructions proposed by Alan Jenkins. Alan Jenkins failed to adequately brief the issue. The Jury instructions

proposed were inapplicable and misstated the law. There was also no reasonable likelihood that the outcome would have been different if the requested Jury instructions had been given.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING ALAN JENKINS' MOTION FOR SUMMARY JUDGMENT.

Alan Jenkins claims the trial court erred in denying his Motion for Summary Judgment. However, where a motion for summary judgment is denied, and then there is a trial, the appellate court will not consider whether the trial court erred in denying the motion for summary judgment. Normandeau vs. Hanson Equipment, Inc., 174 P3d 1 (Utah App. 2007) (a denial of a motion for summary judgment is not appealable because “[a]t trial, [the moving party] had the opportunity to fully litigate the issues raised in the summary judgment motion.” Id. at ¶ 13 [citation omitted.]) In this case, Alan Jenkins may not appeal the trial court’s denial of his Motion for Summary Judgment since there was subsequently a trial and Alan Jenkins had the opportunity to raise at trial the same issues raised in his Motion for Summary Judgment.

Even if the trial court’s denial of Alan Jenkins’ Motion for Summary Judgment was appealable (which it was not), the trial court did not error in denying Alan Jenkins’ Motion for Summary Judgment. In his Motion for Summary Judgment, Alan Jenkins argued that Elaine Jenkins’ quiet title action was barred by the statute of frauds and by the doctrine of “issue preclusion.” Neither of those claims are correct.

A. Plaintiff's Claims Were Not Barred by the Statute of Frauds.

Alan Jenkins claims that the trial court erred in failing to grant his Motion for Summary Judgment on grounds that Elaine Jenkins' claim that D.U. Company held title to the Property for the benefit of Sam and Elaine Jenkins was barred by the statute of frauds. The statute of frauds states that "no estate or interest in property ... shall be created, granted, assigned, [or] surrendered [except] in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same." Utah Code Annotated Section 25-5-1.

Alan Jenkins acknowledges that once a conveyance has been fully or partially completed, that transaction no longer falls within the statute of frauds. See Appellant's Brief, pg. 11 (arguing that "before that exception applies, there must be a showing of an agreement or contract to be performed."). See also, Orton v. Carter, 970 P.2d 1254 (Utah 1998,) (holding that the statute of frauds does not apply to a verbal agreement to transfer an interest in real property where there has been an (1) agreement, (2) part or full performance, and (3) reliance thereon.)

However, Alan Jenkins argues that it is undisputed that there was no oral argument between D.U. Company and Elaine Jenkins pursuant to which D.U. Company agreed to hold title to the Property for the benefit of Elaine Jenkins and her husband and, therefore, Elaine Jenkins' claims were barred by the statute of frauds and the trial court erred in denying his Motion for Summary Judgment. See Appellant's Brief, pg. 15 ("Plaintiff did not allege or show that such an agreement or contract existed.") Alan Jenkins' assertion that there was

no material issue of fact as to the existence of an oral agreement between D.U. Company and the Jenkins is without merit. In her affidavit filed in opposition to Alan Jenkins' Motion for Summary Judgment, Elaine Jenkins alleged that she and Sam Jenkins purchased the Redwood Road House with \$40,000 in equity from the Woods Cross House and 10,000 "units" on deposit with the Davis County Cooperative Society. R. 129. She also averred that D.U. Company "held the Property for the benefit of myself and Sam Jenkins." R. 129.

In reviewing a trial court's denial of a motion for summary judgment, the appeals court will 'review the facts and inferences to be drawn therefrom in the light most favorable to the nonmoving party.'" Peterson v. Coca-Cola USA, 48 P.3d 941, 944 (Utah 2002) quoting Booth v. Attorney's Title Guaranty Fund, Inc., 20 P.3d 319 (Utah 2000.) Elaine Jenkins' affidavit clearly disputes Alan Jenkins' claim that there was no oral agreement made between D.U. Company and Sam and Elaine Jenkins. Therefore, in reviewing the facts and inferences to be drawn in the light most favorable to Elaine Jenkins, the trial court did not err in denying Alan Jenkins' Motion for Summary Judgment because there was clearly a material issue of fact as to whether an oral agreement existed between Sam and Elaine Jenkins and D.U. Company at the time the Redwood Road House was purchased in 1986..

In this case, the agreement between Sam and Elaine Jenkins and D.U. Company was fully performed at the time the Redwood Road House was purchased in 1986. At that time, Sam and Elaine Jenkins transferred \$40,000 in equity from the Woods Cross Property and

10,000 “units” from their account with the Davis County Cooperative Society to pay the \$50,000 purchase price for the Redwood Road Property. The monthly statements introduced by Elaine Jenkins at trial demonstrated that 40,000 units were deducted from the Jenkins’ account at the time the Woods Cross House was purchased, and 10,000 units were deducted from the Jenkins’ account at the time the Redwood Road House was purchased. The annual inventory lists maintained by Davis County Cooperative showed the Woods Cross House as “property” owned by Sam and Elaine Jenkins and later showed the Redwood Road House as “property” owned by Sam and Elaine Jenkins. Documents introduced at trial also demonstrated that Sam and Elaine Jenkins’ account with the Davis County Cooperative Society was debited annually to pay for property taxes on the Property.⁹

The statute of frauds does not “undo” a transaction completed many years earlier simply because the transaction was not “subscribed” in writing at the time of the

⁹All of the three requirements in Orton v. Carter were satisfied. There was an “agreement” - D.U. Company agreed to acquire and hold “legal title” to the Redwood Road House for the benefit of Sam and Elaine Jenkins. There was “full or partial performance” of that agreement - the Jenkins “traded in” the Wood’s Cross House (for a \$40,000 equity trade) and had 10,000 in “units” deducted from their account to pay the purchase price of the Redwood Road House and D.U. Company acquired “legal title” to the Redwood Road House for the benefit of the Jenkins. Finally, there was “reliance.” The Jenkins paid the purchase price for the Redwood Road House. The Jenkins moved out of the Woods Cross House and into the Redwood Road House. 10,000 “units” were deducted from Sam and Elaine Jenkins’ account to pay the balance of the purchase price for the Redwood Road House. The Jenkins paid the property taxes for the Redwood Road House (which were deducted from their account with the Davis County Cooperative Society.) The Jenkins lived in the Redwood Road House and maintained it and improved it and treated it as their own.

conveyance. In this case, the conveyance of the Redwood Road House to D.U. Company for the benefit of the Jenkins occurred in 1986. The dispute arose 19 years after that conveyance, when D.U. Company “sold” the Redwood Road House to Alan Jenkins.

Alan Jenkins’ reliance on Ravarino v. Price, 260 P.2d 570 (Utah 1953) is misplaced. That case involved an action for specific performance of a contract to sell land that defendant had promised to sign under certain conditions, but had not signed. Elaine Jenkins was not seeking specific performance of an oral agreement. Elaine Jenkins was seeking to quiet title to her beneficial interest in a conveyance that occurred 19 years earlier.

In his brief, Alan Jenkins concedes that the full or partial performance exception to the statute of frauds applies in this case once Elaine Jenkins has alleged an oral agreement between her and D.U. Company. Alan Jenkins’ claim that Elaine Jenkins failed to allege such an oral argument is without merit.

B. Plaintiff’s Claims Are Not Barred by the Doctrine of Issue Preclusion.

Alan Jenkins next claims that the statement in the 1997 Divorce Decree that Sam and Elaine Jenkins “owned no other real property” bars Elaine Jenkins, under the doctrine of issue preclusion, from now claiming an interest in the Redwood Road House. Two elements of the doctrine of issue preclusion are not satisfied in this case. Issue preclusion requires that “the issue challenged must be identical in the previous action and in the case at hand” and that the issue “have been competently, fully, and fairly litigated in a previous action.” See Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 1214, 1222 (Utah 2000.) In this

case, neither of those elements were satisfied.

(i) No “identity of issues.” The issue in this case involves whether D.U. Company held title to the Redwood Road House for the benefit of Sam and Elaine Jenkins. That issue was not before the Court in the Jenkins’ divorce action. The issue in the Jenkins’ divorce action was how the marital assets were to be divided between Sam and Elaine Jenkins. The Divorce Decree was entered based on a stipulation that “the parties acquired no other real property during the course of the marriage” and therefore no further property division between Sam and Elaine Jenkins was required. The issue as to whether D. U. Company held legal title to the Redwood Road House for the benefit of Sam and Elaine Jenkins was not “identical” to the issue in the divorce action.

To hold otherwise would lead to the absurd result that, where parties to a divorce proceeding fail to list all of the real property that they own in a divorce decree, the parties are thereafter “barred” from claiming ownership in that property. In other words, where parties to a divorce action fail to list all the property they own in a divorce decree, their ownership interest “disappears.”

This would also lead to the absurd result that a third-party (in this case D.U. Company) would suddenly receive a windfall - title to property that it never owned and never paid for. Should Alan Jenkins’ suggested application of this rule be followed, D.U. Company would now own both legal and equitable title to property that it did not pay for and did not own, and would be able to sell that property and keep the sales proceeds simply

because the true owners had failed to list all the property they owned in a divorce proceeding.¹⁰

(ii) Not competently, fully and fairly litigated. The issue as to whether D.U. Company held legal title to the Redwood Road House for the benefit of the Jenkins was also not “competently, fully, and fairly litigated” in the divorce action. The Divorce Decree was entered by stipulation, not judicial adjudication. “An issue determined by stipulation rather than judicial resolution is binding in a subsequent action if the parties manifested an intention to that effect.” Id. at 1223. (Emphasis added.) See also 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedures § 4443, at 382 (1981) (“Issue preclusion does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation.” (Emphasis added.))

The required intent by Elaine Jenkins was never demonstrated in this case. Before signing the stipulation, Elaine Jenkins specifically asked her attorney whether signing the stipulation would adversely affect her ability to make a claim to her ownership interest in the Redwood Road House. Elaine Jenkins signed the stipulation based on the understanding that signing the stipulation would not adversely affect her ability to establish ownership of the Redwood Road House in the future, should the need arise. Elaine Jenkins testified that had she understood that her signing of the stipulation would have had that effect (i.e., barred

¹⁰In this case, having lost his ownership in the Redwood Road House, Alan Jenkins has the right to recover from D.U. Company the purchase price he paid to D.U. Company. D.U. Company did not have the right to sell Alan Jenkins the Redwood Road House, and was unjustly enriched by receiving proceeds from the sale of property that it did not own.

her right to claim her ownership interest in the future), she would have never signed the stipulation. Accordingly, the issue as to whether D.U. Company held legal title to the Redwood Road House for the benefit of the Jenkins was never “completely, fully, and fairly litigated” in the Jenkins’ divorce action.

II. THE TRIAL COURT DID NOT ERR IN DENYING ALAN JENKINS’ MOTION
TO AMEND HIS ANSWER TO INCLUDE THE
STATUTE OF LIMITATIONS DEFENSE.

On June 2, 2006, Alan Jenkins filed a Motion to Amend Answer of Defendant, seeking to amend his Answer to add for the first time the affirmative defense of the four-year statute of limitations set forth in Section 78-12-25(3) of the Utah Code. Alan Jenkins claims that the trial court “abused its discretion” in denying that motion, and claims that the reason for the court denying defendant’s Motion for Leave to Amend is “not apparent from the record.” Appellant’s Brief, pg 18. However, Alan Jenkins failed to transcribe the Court’s ruling from the bench at the hearing at which Jenkins’ Motion to Amend Answer of Defendant was denied. Alan Jenkins is required to obtain a “transcript of all evidence relevant” to the appeal the trial court’s denial of that motion and “[n]either the court nor the appellees is obligated to correct appellants deficiencies in providing the relevant portion of the transcript:”

If the appellant intends to urge on appeal that a finding or conclusions unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant’s deficiencies in providing the relevant portions of the transcript.

Utah Rules of Appellate Procedure, Rule 11(c)(2).

Alan Jenkins was required to “include in the record a transcript of all evidence relevant” to the Court’s denial of his Motion to Amend Answer of Defendant, and failed to do so. Accordingly, Alan Jenkins’ appeal on this issue should be denied on this basis alone.

Elaine Jenkins has obtained a transcript of the trial court’s ruling on August 14, 2006 on Alan Jenkins’ Motion to Amend Answer of Defendant. The trial court denied Alan Jenkins’ Motion to Amend Answer of Defendant on the grounds that it was untimely, that a late amendment would prejudice plaintiff and that Alan Jenkins had given no “good reason” for the delay:

[w]e have a trial set. It is coming right up; 60 days is not a very long amount of time before the trial is set. Actually this was – we doubled to set this first as a first-place setting and then as a second-place setting.

We’ve passed the second-place setting on – with my determination that not enough time had been – first place had gone to – or to second place had gone to first place; and I didn’t feel it was enough time, given the fact that this is a Jury trial, with the lists and so forth of witnesses; and– that have been designated as witnesses.

So this is really a continue, if you will, or a second – a second setting for this case; and we’re coming right up onto it. So I don’t know there’s much question here that your request is not timely, given that; and your argument, Mr. Kingston, that I had permitted the plaintiff to amend, I’m not giving that much weight for this reason. We – I did that in August of last year, a year ago and more. Actually a year and a half – and a week. I think it was August the 5th with the second request to amend. So it’s been a year since we did that.

All these time periods have passed, including the submission of witness lists and so forth. The matter's in place. So it seems to me that this is untimely. Although I appreciate, Mr. Kingston, your representation that this really is not going to require a great deal of discovery and so forth, if any, I don't know that I can come to that same conclusion.

Apparently you have become aware of this as a result of information that has come to your attention. Seems to me that we're really hard pressed to tell Mr. Cline that "You better be prepared for this affirmative defense," without conducting much – without opening that up. Of course, if I open up discovery, then I've got to open it up, and all the rest of it.

So it seems to me that because this motion is not timely, and because I really don't have a good reason why this motion is untimely, given the fact that we did have a discovery period and so forth, that your motion is respectfully denied.

Transcript of August 14, 2006 hearing, pp 13-15.¹¹

The trial court found that the motion was not timely -- "I don't know there's much question here that your request is not timely." Id. The trial court found that Alan Jenkins had not given any reason for the untimely motion - "I really don't have a good reason why this motion is untimely." Id. The trial court also found that plaintiff would be prejudiced if the motion was granted - "It seems to me that we're really hard pressed to tell Mr. Cline that "you better be prepared for this affirmative defense, without conducting much - without opening [up discovery.]" Id. Accordingly, the trial court gave three reasons for denying defendants' Motion for Leave to Amend, none of which were addressed by Alan Jenkins in

¹¹Elaine Jenkins filed a Motion to Supplement the Record to include this transcript as part of the record. As of the date this brief was filed there had been no ruling on that motion. The transcript has been included with the rest of the record.

his brief. For this reason as well, Alan Jenkins' appeal on this issue should be denied.

III. THE TRIAL COURT DID NOT ERROR IN DENYING ALAN JENKINS JURY INSTRUCTION.

Alan Jenkins offered eight Jury instructions which were rejected by the trial court. Four instructions related to the statute of frauds, two related to issue preclusion, one related to the four year statute of limitations and one related to a cause of action for adverse possession.

A. Standard of Review.

An appellate court may reverse and remand on the basis of a challenge to Jury instructions only if it finds that the refusal to give the requested Jury instructions was reversible error and that error caused prejudice to the complaining party. State v. Stringham, 17 P.3d 1153, 1157 (Utah App. 2001), see also State v. Tinoco, 860 P.2d 988, 990 (Utah App. 1993) and Summerill v. Shipley, 890 P.2d 1042, 1045 (Utah App. 1995).

Reversible error may be found only if the omission of the requested Jury instructions tended to mislead the Jury, or insufficiently or erroneously advised the Jury on the law. Stringham, at 1157. Prejudice to the complaining party may be found only if there is a "reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party." Tingey v. Christensen, 987 P.2d 588, 592 (Utah 1999), see also Cox v. State, 751 P.2d 1152, 1154 (Utah App. 1988.)

The Court of Appeals has held that reversible error may not be found if the reviewing court finds one of the following. First, reversible error may not be found if the instructions,

read as a whole, fairly instructed the Jury on the applicable law. Normandeau v. Hanson Equip., Inc., 174 P.3d 1, 10-11 (Utah App. 2007). Second, if the requested instructions were properly covered in the other approved instructions. Id. And, third, if the requested instructions did not accurately state the applicable law. State v. James, 819 P.2d 781, 799 (Utah 1991.)

B. Failure to Adequately Brief.

Alan Jenkins has devoted almost no discussion as to why the trial court erred in refusing to give the eight requested Jury instructions. The entire discussion is 3 ½ pages. No statutes or case law is cited. None of the eight Jury instructions are set forth in whole or in part in the text. Appellant has the burden of providing a sufficient legal basis for granting his appeal. Alan Jenkins has inadequately briefed this issue for the Court by failing to provide any legal analysis or authority to support his claim of reversible error and prejudice. According to Rule 24(a)(9) of the Utah Rules of Appellate Procedure, briefs must contain reasoned analysis based upon relevant legal authority. Rule 24 of the Utah Rules of Appellate Procedure places the burden upon the appellant to properly brief the issues for review. See Utah R. App. P. 24. “An issue is inadequately briefed when ‘the overall analysis of the issue is so lacking as to shift the burden of research and argument to the reviewing court.’” Smith v. Smith, 1999 UT App 370, ¶ 8, 995 P.2d 14 (citation omitted.) The appellate court may decline to address an issue on this ground alone. Bearden vs. Wardley Corporation, 72 P.3d 144, fnnt 4 (Utah 2003.) Appellant’s brief on this issue is

clearly inadequate because it fails to cite a single legal authority and the arguments, based solely on factual recitations, are completely devoid of any legal analysis. Appellee should not be placed in the position of having to draft a responsive brief when the reasons for appellant requesting reversal are unclear.

Under Rule 24(j) of the Utah Rules of Appellate Procedure, “briefs that are not in compliance with Rule 24 may be disregarded or stricken sua sponte by the Court.” Id. Thus, this Court may properly disregard this issue because it has been inadequately briefed and affirm the trial court’s refusal to give the requested instructions. See State v. Herrera, 895 P.2d 359, 368 (Utah 1995). Alan Jenkins’ appeal on this issue should be dismissed on this grounds alone.

In the event the Court finds that Appellant has adequately briefed this issue, the trial court did not error in denying Alan Jenkins’ proposed Jury instructions.

C. Refusal to Give the Requested Instructions was not Reversible Error.

1. Four Statute of Frauds instructions. Alan Jenkins claims that the trial court erred in refusing to submit the following four Jury instructions, all of which relate to the statute of frauds:

A person claiming an interest in real property, must be able to evidence that interest by a deed or conveyance in writing, signed by the entity or person from whom that person claims to have acquired the interest. If there is no such deed or conveyance in writing, under the law, the person has no enforceable interest in the property.

R. 298.

“Agreement” means the actual bargain between the parties. An agreement for the sale of land is void and unenforceable unless the agreement or some note or memorandum of the agreement is in writing, signed by the party selling the land.

R. 300.

There is an exception to the law that a person claiming an interest in real property must be able to evidence that interest by a deed or conveyance in writing, signed by the entity or person from whom that person claims to have acquired the interest. To qualify for the exception, Elaine Jenkins must prove by clear and positive proof that there was an agreement between her and the property owner that the property would be transferred to her if she performed certain conditions, the agreed condition must be established with certainty and you must find that she did in fact perform those conditions pursuant to the agreement.

R. 299.

In order to find that Elaine Jenkins performed or partially performed an agreement whereby she would obtain title to the real property in question, even though there is no written document evidencing such an agreement, you must find that the owner of the property agreed that upon the performance of certain actions, the property would be transferred to her; that there was a meeting of the minds between the owner of the property and Elaine Jenkins as to what those certain actions were that she was to perform and that she did in fact perform those actions.

R. 304.

(i) Inapplicable. The foregoing instructions, as drafted, are inapplicable since, as a matter of law, the statute of frauds does not apply to a transaction that has already occurred. It is undisputed that Elaine Jenkins property interest in the Redwood Road House, was created, if at all, in 1986.

Furthermore, the instructions incorrectly assume that the conveyance of the Redwood Road House to D.U. Company for the benefit of the Jenkins has not yet taken place and that D.U. Company was the “property owner.” Alan Jenkins claims that Elaine Jenkins must prove “that there was an agreement between her and the property owner that the Property would be transferred to her if she performed certain conditions.” R. 299, 304 (Emphasis added.) In this case, the previous “property owner” was Gordon Berg, and he transferred the Redwood Road House to D.U. Company for the benefit of Sam and Elaine Jenkins in 1986. D.U. Company was never the “property owner” since it never received more than bare legal title, with the beneficial (or ownership) interest belonging to the Jenkins. Elaine Jenkins sought to quiet title to a property interest conveyed to her in 1986, not in some future conveyance. “[T]he trial court may properly refuse to give the requested instructions where it does not accurately reflect the law governing the factual situation of the case.” Black vs. McKnight, 562 P.2d 621, 621 (Utah 1977.)

(ii) Misstates the law. Those Jury instructions misstate the law as to the statute of frauds. If there was an “agreement,” “part or full performance” and “reliance” thereon, the statute of frauds no longer applies. Orton v. Carter, 970 P.2d 1254 (Utah 1998). This exception is not stated in Alan Jenkins’ proposed instructions.

(iii) Unnecessary. The foregoing exception to the statute of frauds was necessarily satisfied if the Jury answered Jury Instruction No. 1 affirmatively. In answering Jury Instruction No. 1 affirmatively, the Jury found that, in 1986, at the time the Redwood

Road House was transferred to D.U. Company, “Sam and Elaine Jenkins and D.U. Company intended that D.U. Company hold legal title to that property for the benefit of Sam and Elaine Jenkins.” Once the Jury answered Jury Instruction No. 1 affirmatively, the Jury also necessarily found that the full or partial performance exception to the statute of frauds applied in this case.

(iv) Covered in other instructions. The trial court did not commit reversible error when it refused to give these proposed instructions to the Jury because the legal correct part of these instructions (i.e., the part that did not misstate the law) was properly covered in the other approved instructions. As discussed above, there is no reversible error if the trial court rejects requested instructions that were fully covered in the other instructions given. Normandeau v. Hanson Equip., Inc., 174 P.3d 1, 10-11 (Utah App. 2007.) The legally correct portions of these requested instructions focus exclusively on the Jury’s determination of whether an agreement was made between appellee and D.U. Company.

Though with fewer words, approved Jury instruction number 14 covered the same applicable instructions and law contained in those instructions. Instruction number 14 stated, “You must decide whether there was an agreement between Sam and Elaine Jenkins and D.U. Company pursuant to which D.U. Company was holding legal title to the property at 1074 Redwood Road for the benefit of Sam and Elaine Jenkins.” It has been held that a party is not entitled “to have the Jury instructed with any particular wording.” Id. at 11. Therefore, because Jury instruction number 14 properly covered, though not in appellant’s

particular wording, the applicable instructions and law contained in those instructions, the trial court did not commit reversible error by refusing to give them.

(v) No prejudice. Even if the trial court's refusal to give Alan Jenkins requested Jury instructions was error (which it was not), Alan Jenkins has the burden of further demonstrating that failure to give the requested instructions was reversible error. In Robinson v. All-Star Delivery, Inc., 992 P.2d 969 (Utah 1999), the Court held that refusal to give a Jury instruction is reversible error only if "there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party:"

We have previously stated the circumstances in which a refusal to give a Jury instruction is reversible error:

We may reverse a trial court judgment only if there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the complaining party. The failure to give an instruction to which a party is entitled may constitute reversible error only if it tends to mislead the Jury to the prejudice of the complaining party or insufficiently or erroneously advises the Jury on the law.

Robinson v. All-Star Delivery, Inc., 992 P.2d 969 (Utah 1999). Id. at 974 [citations omitted.]

Alan Jenkins has not argued how the omission of these requested instructions prejudiced the outcome of the trial in favor of appellee. "Even if we find an error, however, we will reverse only if defendant [appellant] shows reasonable probability the error affected the outcome of his case." State v. Tinoco, 860 P.2d 988, 990 (Utah App. 1993). Appellant has failed to do this. Even if he had attempted such an argument in his brief, it would have

been unpersuasive. The outcome of the trial depended on that Jury's finding of whether an agreement was made between Sam and Elaine Jenkins and D.U. Company pursuant to which D.U. Company would hold legal title to the Property for their benefit. Given that the Jury did find that an agreement was made, the threshold question then becomes, would the Jury have found differently if these instructions had been given to them? The answer is no because the finding of an agreement necessarily exempts the transaction from the application of the statute of frauds. Therefore, appellant has failed to show, or to even argue that there is a reasonable likelihood that, absent the error, there would have been a result more favorable to him. The trial court's refusal to give these instructions did not cause prejudice to appellant.

2. Two Estoppel Jury Instruction. Alan Jenkins claims that two "estoppel" instructions should have been given to the Jury:

When a person, by her acts or conducts, voluntarily causes another to believe in the existence of a certain state of things, and thereby induces him to act on that belief so as to change his previous condition, the person inducing such belief will be estopped from afterwards denying the existence of such state of things, to the prejudice of the person so action.

R. 303.

A party cannot adopt a position in a subsequent lawsuit contrary to a position ruled upon by the court in a previous lawsuit. If you find that in Elaine Jenkins' previous divorce action, she took the position that she did not own the property in question and that the court ruled in a final judgment that she did not own the property, then you must find against her on the claim she now makes in this lawsuit that she does own the property.

R. 305.

(i) Inapplicable. The first Jury instruction (R. 303) is inapplicable since Alan Jenkins was not a party to the divorce action and therefore nothing Elaine Jenkins signed in the divorce action would have “induce[d] Alan Jenkins to [rely thereon] so as to change his” position.

As to the second Jury instruction (R. 305), for the doctrine of “issue preclusion” to apply, the issue in the previous action must be identical to the issue in the present action and most have been “completely, fully and fairly litigated” in the previous action. See Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 121, 1222 (Utah 2000.) The second Jury instruction is inapplicable since, as a matter of law, the issue in the divorce action was not identical to the issue in this action. Furthermore, because the Divorce Decree was based on a stipulation, the issue of whether legal title to the Redwood Road House was held by D.U. Company for the benefit of the Jenkins was not, as a matter of law, “completely, fully and fairly litigated” in the divorce action. These issues were previously discussed on pages 17-20.

(ii) Misstates the law. For issue preclusion to apply, the issue in the prior case and in the present case must be “identical” and the issue must have been “fully, fairly and completely” litigated in the prior action. See Macris & Associates, Inc. v. Neways, Inc., 16 P.3d 121, 1222 (Utah 2000.) Neither of these requirements are included in Alan Jenkins’ proposed Jury instructions.

(iii) No prejudice. Finally, Alan Jenkins fully argued this issue at trial, in its proper context, as evidence that the Jenkins and D.U. Company did not intend that D.U. Company acquire and hold title to the Redwood Road House for the benefit of the Jenkins:

I want you to take a closer look at P-9 [the Divorce Decree], which is the stipulation for divorce. You'll see that everything that does normally occur at any divorce action would be acquitted in that stipulation. All the property is divided, the assets are divided, the provisions made for the recitation of the children and so on.

Again, do you really believe that a divorce attorney would give advice to his client, "Look, don't worry about that. You don't have to show that. You don't have to list that. You don't have to declare it." Of course, if she talks about missing witnesses. Do you think that she could get that attorney to come in here and acknowledge that she gave that kind of information or advice?

R. 386, pp. 521-22.

As far as the divorce attorney saying, "Well, let's not worry about them now; let's take it up later," a divorce would be the time to take care of all the issues on property ownership. That's where you do it. That's why you have the divorce; so you can decide who owns what, who has to pay what bills, who has rights to the children and so on. It's not something an attorney would say, "We don't have to deal with that now; we'll just deal with it later. We're just going to tell the Court right now, we don't own any property."

R. 386, p. 533.

Alan Jenkins argued that Elaine Jenkins' testimony regarding statements by her divorce attorney were unbelievable - "[D]o you really believe that a divorce attorney would give advise to his clients...you don't have to list [the Redwood Road House]." Id. at 522. "It's

not something an attorney would say, ‘We don’t have to deal with that now, we’ll just deal with it later. We’re just going to tell the Court right now, we don’t own any property.’” Id. at 533. Alan Jenkins argued to the Jury that Sam and Elaine Jenkins’ failure to include the Redwood Road House as a marital asset in the Divorce Decree was evidence that the Jenkins did not own any interest in the Redwood Road Property. Alan Jenkins made his argument to the Jury, and the Jury found to the contrary. Accordingly, Alan Jenkins has failed to demonstrate that there was a “reasonable likelihood” that the Jury would have reached a more favorable result if the proposed instruction had been given. See Robinson vs. All-Star Delivery, Inc., 992 P.2d 969, 974 (Utah 1999.)

3. Statute of Limitations Instructions. Alan Jenkins claims that the trial court erred in failing to give the following Jury instruction on the four-year statute of limitations to the Jury:

There is a four year statute of limitations that governs the recovery of real property held by a person other than the owner of the property. This means that in order to recover property held in trust by another entity, the true owner must file suit to recover the property within four years from the time she discovers that the property was not in her name. Elaine Jenkins claims that although Alan Jenkins holds legal title to the property. If you find that Elaine Jenkins did pay for the subject property, in order to prevail on this claim, Elaine Jenkins must show that she did not learn that the property was in someone’s name other than hers and Sam’s until a date less than four years from the date she filed the Complaint in this case. If you find that Elaine Jenkins knew that the title to the property in question was held in someone’s name other than hers or Sam’s more than four years before she filed the lawsuit in this case, you must find in favor of Alan Jenkins.

R. 301.

(i) Inapplicable. The four year statute of limitations is found in Utah Code Annotated, Section 78-12-25(3). Alan Jenkins did not raise that statute of limitations in his Answer to the Second Amended Complaint. See R.166-172. The four year statute of limitations is inapplicable because it was not raised as an affirmative defense. If an affirmative defense is not raised, it is waived. See Utah Rules of Civil Procedure, Rule 12 (“A party waives all defenses and objections not presented by motion or by answer or reply.”); Conder v. Hunt, 1 P.3d 558 (UT 2000) (statute of limitations that was not raised in Answer was waived); Tanner v. Provo Reservoir Co., 2 P.2d 107 (Utah 1931) (statute of limitations that was not raised in Answer was waived.) In June, 2006, Alan Jenkins tried to amend his Answer to include this statute of limitations as a defense, but that motion was denied. Whether the trial court abused its discretion in denying that motion has been previously discussed.

(ii) Misstates the law. Even if that instruction was applicable (which it is not), that instruction also misstates the law. The instruction states that “Elaine Jenkins must show that she did not learn that the [Redwood Road House] was in someone else’s name other than hers until a date less than four years from the date she filed the Complaint.” That is not correct. Elaine Jenkins has known that the Redwood Road House was not in her name since the date it was purchased in 1986. Since 1986, Elaine Jenkins has believed that D.U. Company held legal title to the Redwood Road House for the benefit of herself (and Sam.)

Because D.U. Company held legal title for the benefit of the Jenkins, it was not until D.U. Company sold the Redwood Road House to Alan Jenkins in 2005 that Elaine Jenkins' claim arose. Elaine Jenkins immediately filed a Complaint.

(iii) No prejudice. As previously discussed, Alan Jenkins has failed to provide any discussion as to a "reasonable likelihood" that giving the requested instruction would have resulted in a "more favorable verdict." Even if the requested instruction had been given, the verdict would have been the same.

4. Adverse possession instruction. Alan Jenkins claims that the trial court erred in failing to give the following Jury instruction to the Jury:

The occupation of real property by someone other than the person who established legal title to the property is deemed to be under and by the authority of the person establishing legal title, unless the person occupying the property can show that she has occupied the property for at least seven years and that during that seven year period, she has paid all of the taxes levied and assessed against the property. Unless you find that Elaine Jenkins has paid all of the real property taxes assessed against the property for seven consecutive years, and that such payment was not paid to the property owner as partial rent or consideration for the right to use of the property under a rental agreement, you must find in favor of Alan Jenkins.

R. 302.

(i) Inapplicable. This instruction is based on Utah Code Sections 78-12-7 and 78-12-12. See citation at the bottom of R. 302. Those statutes relate to the "recovery" of real property in an adverse possession action, during which the claimant has paid property taxes for seven years. This is not a "recovery" action since Elaine Jenkins is not trying to

“recovery” title from D.U. Company. Elaine Jenkins is trying to “quiet title” as to what already exists - that D.U. Company has held legal title for Jenkins since the property was acquired in 1986. This instruction was inapplicable since Elaine Jenkins did not file a claim for adverse possession. No claim for adverse possession was heard by the Jury.

(ii) Misstates the law. Alan Jenkins claims that “occupation of real property by someone other than” the record title holder is deemed to be “under the authority of” the legal title holder unless that person has paid taxes for seven years. That is not the law. Elaine Jenkins theory of recovery was that the Redwood Road House was held by D.U. Company for the benefit of Elaine Jenkins. See, e.g., Park vs. Zions First National Bank, 673 P.2d 590 (Utah 1983.) Alan Jenkins has not challenged that theory of recovery. The fact that D.U. Company held legal title does not mean that the Jenkins occupied the Redwood Road House “under the authority” of D.U. Company, since D.U. Company held legal title for the benefit of the Jenkins.

That instruction also states that “unless you find that Elaine Jenkins paid all of the real property taxes assessed against the property for seven years. . . you must find in favor of Alan Jenkins.” Again, that is not the law. While Sam and Elaine Jenkins did pay property taxes through debits from their account with Davis County Cooperative Society, Elaine Jenkins did not proceed under an “adverse possession” theory. Where D.U. Company held title to the property for the benefit of Sam and Elaine Jenkins, a finding that “Elaine Jenkins paid all of the real property taxes assessed against the property for seven years” was

not necessary to find in favor of Elaine Jenkins.

(iii) No prejudice. As previously discussed, Alan Jenkins has failed to provide any discussion as to a “reasonable likelihood” that giving the requested instruction would have resulted in “more favorable verdict.” Even if the requested instruction had been given, the verdict would have been the same.

CONCLUSION

For the foregoing reasons, Alan Jenkins appeal should be denied and Elaine Jenkins should be awarded her costs for defending this matter on appeal.

DATED this 3 day of July, 2008.

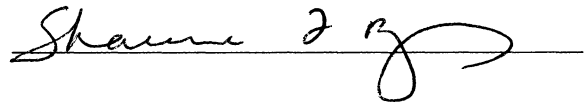


RUSSELL A. CLINE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 3 day of July, 2008, I mailed two copies of the foregoing to:

Carl E. Kingston
3212 S. State St.
Salt Lake City, UT 84115

A handwritten signature in cursive script, appearing to read "Shaun D. Ry", is written over a horizontal line.

ADDENDUM A

SAM & ELAINE JENKINS PROPERTY

	UNITS USING JAN.1,1984		UNITS USING JAN.1,1985	
	STEWARDSHIP	PERSONAL	STEWARDSHIP	PERSONAL
Business Clothing for Resale	2459.50		2000.00	
House		40000.00		40000.00
Green House		150.00		100.00
1971 Van	400.00			
1965 Van	550.00			
Bee Supplies	75.00			
VW		50.00		25.00
1973 Olds		200.00		
1973 Suburban				1500.00
1973 Buick Sta. Wagon			200.00	
PERSONAL PROPERTY		2218.00		2200.00
Fridge		200.00		
Fruit Trees		150.00		
Furniture		80.00		80.00
Toys for Resale		100.00	100.00	
Moped		150.00		100.00
Bosch		270.00		200.00
	<u>3484.50</u>	<u>43568.00</u>	<u>2300.00</u>	<u>44205.00</u>
	2300.00			43568.00
STEWARDSHIP DECREASE.....	1184.50		PERSONAL INCREASE.....	637.00
	<u>637.00</u>			
TOTAL PROPERTY DECREASE.....	547.50			

TOTAL PROPERTY DECREASE..... 547.50
 PI..... 4,800.00
 DEBTS FROM 1984 STATEMENTS..... 2,050.49
 BALANCE INCREASE LESS DEBTS..... 2,193.01
 PLACED IN RESERVE..... 219.30
 BALANCE INCREASE LESS RESERVE..... 1,973.71
 TOTAL UNITS OWNED JAN 1, 1984..... 43,780.53
 TOTAL UNITS OWNED JAN 1, 1985..... 45,763.24
 STEWARDSHIP UNITS USING 1985 2300.00
 PERSONAL UNITS USING 1/1/85 44205.00
 TOTAL UNITS USING JAN 1, 1985..... 46,505.00
 TOTAL UNITS PAYING SERV CHG ON FOR 1985 741.76
 ① 3,262.97 less ② 4,800.00 plus ③ 2,059.49 plus ④ 219.30
 equals ⑤ 741.76

DATE _____

SIGNATURE _____

DATE _____

I, or we, the undersigned hereby declare that this inventory and balance sheet as stated, is true and accurate that I will pay the balance due (showing as units paying service charge on) on demand.

SIGNED IN THE PRESENCE OF:

SIGNATURE _____



SAM & ELAINE JENKINS PROPERTY

cb

	UNITS USING JAN.1,1985		UNITS USING JAN.1,1986	
	STEWARDSHIP	PERSONAL	STEWARDSHIP	PERSONAL
Business.Clothing /Resale	2000.00		1000.00	
House		40000.00		40000.00
Green House		100.00		100.00
VW		25.00		25.00
1973 Suburban		1500.00		1000.00
1973 Buick Sta. Wagon	200.00		100.00	
PERSONAL PROPERTY		2200.00		2200.00
Furniture		80.00		80.00
Toys for Resale	100.00		100.00	
Moped		100.00		100.00
Bosch		200.00		200.00
	<u>2300.00</u>	<u>44205.00</u>	<u>1200.00</u>	<u>43705.00</u>
	1200.00			
STEWARDSHIP DECREASE.....	1100.00	Acc Payable.....		5400.00
		38305.00	m	38305.00
PERSONAL DECREASE.....		5900.00		
		1100.00		
TOTAL PROPERTY DECREASE.....		7000.00		
DUE ANNETTE MORGAN FOR TOYS		44.29		
NOTE PAYMENTS 1985.....		\$ 4800.00		
DEBTS FROM 1985 STATEMENTS.....		388.77		
DECREASE IN PROPERTY.....		7000.00		
DECREASE PLUS DEBTS LESS NOTE PYMT.....		\$ 2633.06		
TOTAL UNITS OWNED JAN.1,1985.....		45763.24		
TOTAL UNITS OWNED JAN.1,1986.....		\$ 43130.18		
STEWARDSHIP UNITS USING JAN.1,1986..		\$ 1200.00		
PERSONAL UNITS JAN.1,1986.....		38305.00		39505.00
UNITS RECEIVING SERVING CHARGE ON FOR 1986		\$ 3625.18		

\$741.76 plus \$388.77 minus \$4800.00 plus 44.29 equals \$3625.18

DATE _____ SIGNATURE _____

DATE _____

I, or we, the undersigned do hereby _____

my units as shown above, in the following manner _____

SIGNED IN THE PRESENCE OF:

SIGNATURE

SAM & ELAINE JENKINS' PROPERTY

	UNITS USING JAN.1,1987 STEWARDSHIP	PERSONAL	UNITS USING JAN.1,1988
Business Clothing-Resale	1000.00		
House		40000.00	
Green House		100.00	100.00
VW		25.00	
1973 Suburban		1000.00	500.00
1973 Buick Sta Wagon	100.00		
PERSONAL PROPERTY		2200.00	2300.00
Furniture		80.00	80.00
Toys for Resale	100.00		
Moped		100.00	100.00
Bosch		200.00	50.00
House Redwood Road		50000.00	50000.00
1981 Datsun 210			1000.00
	<u>1200.00</u>	<u>93,705.00</u>	<u>.00</u>
	.00	54,130.00	
STEWARDSHIP DECREASE..	1200.00	39,575.00	DECREASE IN PERSONAL PROPERTY
		1,200.00	
TOTAL PROPERTY DECREASE.....		40,775.00	

PL.....	\$ 4,800.00
INCREASE FROM 1987 STATEMENTS...	\$ 34,150.38
DUE FROM WCTS FOR 3 MO INTEREST ON HOUSE.....	1,200.00
STATEMENT INCREASE PLUS DUE FROM WCTS.....	40,150.38
DUE TO WCF PROP TAXES 85 THRU MAY 87.....	844.31
BALANCE INCREASE.....	39,306.07
DECREASE IN PROPERTY....	40,775.00
BALANCE DECREASE.....	1,468.93
UNITS OWNED JAN 1, 1987.....	54,440.35
UNITS OWNED JAN 1, 1988.....	52,971.42
UNITS USING JAN 1, 1988.....	54,130.00
UNITS PAYING SERVICE CHARGE ON FOR 1988.....	1,158.58

✓ 40,464.65 less 34,150.38 less 1,200.00 plus 844.31 less
✓ 4,800.00 equals 1,158.58

DATE _____ SIGNATURE _____

DATE _____

I, the undersigned do hereby declare that this inventory and balance sheet as stated is true and accurate, that I will pay the balance due (showing as units paying service charge on) on demand.

SIGNED IN THE PRESENCE OF: SIGNATURE

JENKINS, SAM & ELAINE Property

VS

	Units Using Stewardship	1-Jan-90 Personal	Units Using Stewardship	1-Jan-91 Personal
PERSONAL PROPERTY		\$2,400.00		\$2,400.00
Green house		50.00		50.00
1973 Suburban		500.00		500.00
Furniture		80.00		80.00
Moped		50.00		50.00
Moped		10.00		10.00
Bosch		50.00		50.00
House Redwood Road		50,000.00		50,000.00
1981 Datsun 210		300.00		300.00
Dodge Dart		100.00		100.00
1976 Dodge Dart		400.00		400.00
1978 Toyota		800.00		800.00
1966 Chevelle		100.00		100.00
Payables Sam		(13,770.00)		(13,770.00)
Payables Elaine		(21,402.00)		(21,402.00)

	\$0	\$0.00	\$19,668.00	\$0.00	\$19,668.00
				.00	19,668.00
INCREASE / DECREASE IN PROPERTY				\$0.00	\$0.00
PL					\$0.00
DECREASE FROM 1990 STATEMENT					(\$3,583.66)
INCREASE IN STEWARDSHIP PROPERTY				.00	
INCREASE IN PERSONAL PROPERTY				.00	
TOTAL INCREASE IN PROPERTY					.00
					.00
BALANCE DECREASE FOR 1990					(3,583.66)
					.00
BALANCE DECREASE					(3,583.66)
TR 2					1,164.80
TOTAL UNITS A 1-Jan-90					19,860.43
TOTAL UNITS A 1-Jan-91					17,441.57
TOTAL UNITS USING 1-Jan-91					19,668.00
UNITS PAYING INTEREST ON FOR 1991					(\$2,226.43)
\$192.43 + (\$3,583.66) + \$0.00 + \$1,164.80 = (\$2,226.43)					

DATE _____ SIGNATURE _____

DATE _____

I or we the undersigned hereby declare that this inventory and balance sheet as stated is true and accurate, that I will pay the balance due (showing as units paying service charge on) on demand.

SIGNED IN THE PRESENCE OF:

SIGNATURE:

JENKINS, SAM & ELAINE Property

LVK

	Units Using Stewardship	1-Jan-94 Personal	Units Using Stewardship	1-Jan-95 Personal
PERSONAL PROPERTY		\$2,500.00		\$2,500.00
1973 Suburban		500.00		500.00
Furniture		80.00		80.00
Moped		10.00		10.00
Bosch		50.00		50.00
House Redwood Road		50,000.00		50,000.00
1963 Dodge Dart		100.00		100.00
1976 Dodge Dart		500.00		500.00
1976 Toyota		500.00		50.00
1966 Chevelle		100.00		100.00
1964 Dodge Dart(bad engine)		50.00		50.00
Payables Sam		(13,770.00)		(13,770.00)
Payables Elaine		(21,402.00)		(21,402.00)
VW Rabbit				200.00
Trailer Van Dyke				800.00
Trailer Tammarac H				300.00
Dodge Van				1,800.00

	\$0	\$0.00	\$19,218.00	\$0.00	\$21,868.00
				.00	19,218.00
INCREASE / DECREASE IN PROPERTY				\$0.00	\$2,650.00

PL		\$0.00
DECREASE FROM 1994 STATEMENT		(\$1,050.52)
INCREASE IN STEWARDSHIP PROPERTY	.00	
INCREASE IN PERSONAL PROPERTY	2,650.00	
TOTAL INCREASE IN PROPERTY		2,650.00
		.00
		.00
BALANCE INCREASE FOR 1994		1,599.48
PIR		(159.95)
BALANCE INCREASE LESS PIR FOR		1,439.53
		.00
TOTAL UNITS A 1-Jan-94		19,428.14
TOTAL UNITS A 1-Jan-95		20,867.67
TOTAL UNITS USING 1-Jan-95		21,868.00
UNITS PAYING SERVICE CHARGE ON FOR 1995		(\$1,000.33)

$$\$210.14 + (\$1,050.52) + (\$159.95) + \$0.00 = (\$1,000.33)$$

DATE _____

SIGNATURE _____

DATE _____

I or we the undersigned hereby declare that this inventory and balance sheet as stated is true and accurate, that I will pay the balance due (showing as units paying service charge on) on demand.

SIGNED IN THE PRESENCE OF:

SIGNATURE:

JENKINS, SAM & ELAINE Property

MK

	Units Using Stewardship	1-Jan-95 Personal	Units Using Stewardship	1-Jan-96 Personal
PERSONAL PROPERTY		\$2,500.00		\$2,500.00
1973 Suburban		500.00		
Furniture		80.00		80.00
Moped		10.00		10.00
Bosch		50.00		50.00
House Redwood Road		50,000.00		50,000.00
1963 Dodge Dart		100.00		100.00
1976 Dodge Dart		500.00		500.00
1976 Toyota		50.00		50.00
1966 Chevelle		100.00		100.00
1964 Dodge Dart(bad engine)		50.00		50.00
Payables Sam		(13,770.00)		(16,770.00)
Payables Elaine		(21,402.00)		(21,402.00)
VW Rabbit		200.00		50.00
Trailer Van Dyke		800.00		800.00
Trailer Tammarac		500.00		
Dodge Van		1,800.00		1,600.00

	\$0	\$0.00	\$21,868.00	\$0.00	\$17,718.00
			17,718.00	.00	
INCREASE / DECREASE IN PROPERTY			(\$4,150.00)	\$0.00	

PL		\$0.00
INCREASE FROM 1995 STATEMENT		\$1,186.41
INCREASE IN STEWARDSHIP PROPERTY	.00	
DECREASE IN PERSONAL PROPERTY	(4,150.00)	
TOTAL DECREASE IN PROPERTY		(4,150.00)
TR TO LORIN JENKINS		(3.24)
		.00
BALANCE DECREASE FOR 1995		(2,966.83)
BALANCE DECREASE		(2,966.83)
		.00
TOTAL UNITS A 1-Jan-95		20,867.67
TOTAL UNITS A 1-Jan-96		17,900.84
TOTAL UNITS USING 1-Jan-96		17,718.00
UNITS RECEIVING SERVICE CHARGE ON FOR 1996		\$182.84

(\$1,000.33) + \$1,186.41 + (\$3.24) + \$0.00 = \$182.84

DATE _____

SIGNATURE _____

DATE _____

I, the undersigned do hereby _____ my units as shown above, in the following manner:

SIGNED IN THE PRESENCE OF:

SIGNATURE: